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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY VAUGHN KIMBLE,

Defendant and Appellant.

C060478

(Super. Ct. No. CM026600)

A jury found defendant Kelly Vaughn Kimble guilty of stalking. The court found he had two prior strikes (including one for criminal threats) and had served a prior prison term. The court sentenced him to prison for 25 years to life plus 1 year.

On appeal, defendant contends the court erred in using his criminal threats conviction as a strike. In his view, the court should have limited use of his criminal threats conviction to enhance his sentence pursuant to the punishment provision of the stalking statute itself.

To put defendant's argument in context, we set forth the pertinent provisions of the stalking statute (Pen. Code,¹ § 646.9, *italics added*):

"(a) Any person who . . . harasses another person and who makes a credible threat . . . is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

"(b) Any person who violates subdivision (a) when there is a temporary restraining order . . . shall be punished by imprisonment in the state prison for two, three, or four years.

"(c) (1) *Every person who, after having been convicted of a felony under Section 273.5, 273.6, or 422 [criminal threats], commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years.*

"(2) Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three, or five years."

¹ Further section references are to the Penal Code.

Defendant makes three arguments as to why his criminal threats conviction cannot be used to enhance his sentence pursuant to the three strikes law. We consider each in turn, rejecting all on the merits.

I

*Simply Because The At-Issue Penalty Provision
Of The Stalking Statute Was Enacted After The
Three Strikes Law Does Not Mean It Controls*

Defendant contends the at-issue penalty provision of the stalking statute controls over the three strikes law because criminal threats was added as an enhancing conviction to the stalking statute after the three strikes law was already in force.

An analogous argument was rejected in *People v. Acosta* (2002) 29 Cal.4th 105. There, one of the issues was whether the three strikes law applied notwithstanding the defendant's eligibility for sentencing under the one strike law. (*Acosta*, at p. 108.) The California Supreme Court found it did, explaining as follows: "[W]hen it passed the Three Strikes law, the Legislature did not know what statutes would be later enacted. However, we must assume the Legislature also was aware of this fact, and if it had intended that the Three Strikes law would not necessarily apply to later enacted statutes, it would have so specified. Instead, . . . the Legislature specified that the sentencing provisions of the Three Strikes law 'shall be applied in every case' where a defendant has a qualifying prior felony conviction, '[n]otwithstanding any other law.'

(§ 667, subd. (f)(1).) This language indicates the intent to preclude, absent amendment of the Three Strikes law, a subsequent Legislature from rendering the Three Strikes law's sentencing provisions inapplicable to a particular felony conviction, either in every case involving that particular felony or under specified circumstances." (*Acosta*, at p. 121.)

Despite defendant's efforts to distinguish *Acosta* because it "dealt with a later-enacted statute that is significantly different than the one involved [here]," the rationale of *Acosta* applies and dooms defendant's argument.

II

The Special Over General Rule Does Not Apply

Defendant contends the at-issue penalty provision of the stalking statute is a special statute and controls over the more general three strikes statute. He is wrong.

The special over general rule is triggered "(1) when each element of the general statute corresponds to an element on the face of the special statute, or (2) when it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson* (1981) 30 Cal.3d 290, 295-296.) Neither condition is satisfied here.

One, the elements of the three strikes law do not correspond to the elements of the at-issue penalty provision of the stalking statute. Under the three strikes law, to qualify as a strike, a prior conviction must be for a serious or violent felony. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Under

the at-issue penalty provision of the stalking statute, the prior convictions that increase the punishment for stalking include crimes that by themselves do not qualify as serious or violent felonies, including inflicting corporal injury (§ 273.5) and violating a protective order (§ 273.6). (§ 646.9, subd. (c)(1).)

Two, it does not appear from the statutory context that a violation of the stalking statute will necessarily or commonly result in application of the three strikes law. Even though both statutes provide for increased punishment where a defendant has enumerated prior convictions, as we have explained, there are certain convictions that can serve to increase punishment only for stalking, such as inflicting corporal injury (§ 273.5) or violating a protective order (§ 273.6), and that by themselves do not trigger application of the three strikes law.

Because neither condition of the special over general rule is met, defendant's argument fails.

III

The Rule Of Lenity Does Not Apply

Defendant's final contention as to why the three strikes law cannot apply in his case is the so-called rule of lenity. That rule requires a court to construe an ambiguous criminal statute as favorably to the defendant as its language and intent will reasonably permit. (*People v. Douglas* (2000) 79 Cal.App.4th 810, 815.) The rule of lenity applies ""only if the court can do no more than guess what the legislative body intended."" (*People v. Floyd* (2003) 31 Cal.4th 179, 188.)

Here, we do not have to guess as to what the Legislature intended. The Legislature has specifically stated the three strikes law "shall be applied in every case in which a defendant has a [qualifying] prior felony conviction" "[n]otwithstanding any other law" (§ 667, subd. (f)(1).) If that was not clear enough, the ballot argument in favor of the initiative version of the three strikes law "asserted that its passage would 'strengthen' the legislative Three Strikes law and 'tell' the 'Sacramento politicians' who 'pass[ed]' the law, '"hands off 3 Strikes.'" (People v. Acosta, supra, 29 Cal.4th at p. 121.)

On this record, defendant's attempt to apply the rule of lenity fails.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.